

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 474/06**

In the matter between:

**DR. AUGUSTINE EZEUGU & OTHERS**

**APPLICANT**

And

**SWAZILAND GOVERNMENT**

**1<sup>st</sup> RESPONDENT**

**PRINCIPAL SECRETARY - MINISTRY OF HEALTH**

**AND SOCIAL WELFARE**

**2<sup>nd</sup> RESPONDENT**

**ATTORNEY GENERAL**

**3<sup>rd</sup> RESPONDENT**

**ACCOUNTANT GENERAL**

**4<sup>th</sup> RESPONDENT**

**PRINCIPAL SECRETARY - MINISTRY OF PUBLIC**

**SERVICE & INFORMATION**

**5<sup>th</sup> RESPONDENT**

In re:

**SWAZILAND GOVERNMENT**

**APPLICANT**

**AND**

**DR. AUGUSTINE EZEUGU & OTHERS**

**RESPONDENTS**

**CORAM**

**NKOSINATHI NKONYANE: ACTING JUDGE**

**DAN MANGO: MEMBER**

**GILBERT NDZINISA; MEMBER**

**FOR APPLICANTS: M. MKHWANAZI**

**FOR RESPONDENTS: M. VILAKATI**

**R U L I N G 20.02/07**

[1] The applicants brought an application and are seeking an order in the following terms:-

- "1. Committing the 2<sup>nd</sup> Respondent to gaol for contempt of court following his failure to comply with orders of this court for a period to be determined by the above Honourable court.
2. Such order dealing with the contempt of the 2<sup>nd</sup> Respondent as this Honourable Court may deem fit.
2. Costs of this as between on the attorney own client scale.
4. Declaring Establishment Circular No.7 of 1993 unlawful and unreasonable in so far as the formula of computation and payment of on-call and standby allowances is concerned.
4. Further and or / alternative relief."

- [2] The application is founded upon a Founding Affidavit deposed thereto by the applicants' attorney Mr. Mkhwanazi.
- [3] On behalf of the respondents an Answering Affidavit was filed deposed thereto by one Muntu Mntungwa.
- [4] In the Answering Affidavit a point of law was raised on behalf of the respondents. The point of law raised was that the application for contempt of court is ill conceived as the judgement that was entered by the court in favour of the applicants was a money judgement and cannot in law be enforced by way of contempt of court proceedings.
- [5] The court is therefore presently asked to make a ruling on this point of law raised.
- [6] It is common cause that the present applicants obtained a judgement against their employer, the Swaziland Government on the 1<sup>st</sup> September 2006. The terms of the court order or judgement was that the employer was to make certain money payments to the applicants within fourteen days, and also to pay the costs.
- [7] The Swaziland Government ("the Government") however failed to comply with that court order.
- [8] On the 14<sup>th</sup> December 2006 the applicants instituted proceedings calling upon the Government to appear before the court to explain why it was refusing to obey the court order. That application was placed before the court on the 15<sup>th</sup> December 2006.

- [9] On that day a consent order was made by the court after it was informed that the parties have agreed that the payment would be made on or before the 31<sup>st</sup> December 2006.
- [10] It seems that the Government has further failed to comply with the court order despite the undertaking it made that it was going to make the payment on or before the 31<sup>st</sup> December 2006.
- [11] The applicants have come to court again to seek its intervention in the matter.
- [12] At this particular point however, the court is only called upon to answer the question of law raised. It will not go into the merits of the case.
- [13] Orders of this court are enforced in the same manner as in the High Court. The enforcement of this court's orders is provided for under section 14 of the Industrial Relations Act No.1 of 2000 as amended.

That section provides that:- "**14. An order of the court -**

- (a) ***Made under this act and directing the payment of money or the delivery of any property shall be enforceable by execution in the same manner as an order of the High court.***

**(b) Directing the performance or non-performance of any act shall be enforceable by contempt proceedings in the court in the same manner as an order of the High Court."**

There was no argument that the court order in question was not an order directing the payment of money. In terms of Section 14(a) therefore such an order is enforceable by execution.

The order was made against the Government as the employer of the applicants. The first question that arises therefore is, can the execution process proceed where the respondent is the Government.

The answer to the above question is to be found in the Government Liabilities Act No.2 of 1967. Section 4 thereof provides that:-

**"No execution or attachment or process in the nature thereof shall be issued against the defendant or respondent in any such action or proceedings referred to in section 2 or against any property of the Government: provided that the Accountant General shall cause such money as may, by judgment or order of the court, be awarded to the plaintiff or the petitioner, as the case may be, to be paid out of the revenues of Swaziland."**

It is clear from this section therefore that no execution or attachment shall be made against the property of the Government.

The second question that arises is, what remedy do the applicants have in these circumstances or; put differently, is the present application for committal for contempt appropriate?

To answer this question it is important for one to appreciate the two categories into which court orders fall. The distinction is succinctly summarized by **HERBSTEIN AND VAN WINSEN** "THE

CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA" (4<sup>th</sup> edition) 1977 at page 820 as follows:-

*"Orders of court are, generally speaking, divided into two categories: orders ad pecuniam solvendam (sc order to pay a sum of money) and orders ad factum praestandum (sc orders to do, or abstain from doing, a particular act, or to deliver a thing). Not every order of court can be enforced by committal for contempt. The order must be one ad factum praestandum before the court will enforce it in that manner...".*

As already pointed out (in paragraph 15) the nature of the order in question is not in dispute. It is an order to pay a sum of money. From the authority referred to above, it is clear that it cannot be enforced by committal for contempt.

The court was referred to various court decisions from the Eastern Cape in the Republic of South Africa. There will be no need however, for the purposes of this ruling, to delve into those judgements emanating from the Eastern Cape as there is a Supreme Court of Appeal decision that dealt with a similar point and reversed those decisions.

In the case of **JAYIYA V. MEMBER FO THE EXECUTIVE COUNCIL FOR WLFARE, EASTERN CAPE, AND ANOTHER 2004 (2) S.A. 611 (SCA), CONRADIE JA** held at page 9 that:-

*"Save for one exception, an order for the maintenance of one whom the judgement debtor is liable to maintain, a money judgement is not enforced by contempt proceedings but by execution. The State Liability Act in S.3 precludes execution against the property of a provincial administration (now government), so that this avenue of obtaining satisfaction of her debt was not open to the appellant*

The Supreme Court of Appeal in the Republic of South Africa therefore reinforced the common law position that a money judgement is not enforced by contempt proceedings but by execution.

The court in that case overruled the decision in the case of **MJENIV. MINISTER OF HEALTH AND WELFARE, EASTERN CAPE 2000 (4) SA 446 (TK)**. In the Mjeni case Jafta J. purported to expand or evolve the common law position as it meant that those who sue the State run the risk of obtaining hollow and unenforceable judgments.

In response to this robust stance adopted by Jafta J, the Supreme Court of Appeal pointed out as follows at page 10:-

***"The common law cannot evolve in conflict with statute law or basic principles of law. The State Liability Act outlaws the 'attachment' of the nominal defendant or respondent in proceedings against a government department. There is nothing that any evolution of the common law can do about that. Moreover, the common law must evolve in a principled way. One of the fundamental tenets of the common law is that of legality: it cannot evolve in such a way as to (retrospectively) create a new crime or extend the limits of an existing one. This is what the decisions in the Eastern Cape appear to have done. Contempt of court, even civil contempt of court, is a criminal offence."***

There was half hearted attempt to persuade the court to exercise its equitable jurisdiction in this matter in line with the provisions of Section 4(b) of the Industrial Relations Act. That section states that one of the purpose and objective of this Act is to promote fairness and equity in labour relations.

[28] In order for the court to properly exercise its powers in line with this provision of the Act however, the application must have been brought before the court under the correct head.

[29] As an aside, the court will point out that if indeed as a matter of fact, the applicants have still not been paid, it is a serious cause for concern. Such conduct of the Government is contrary to the assurance by the head of the Executive that Government will obey court orders.

[30] Furthermore, such conduct impacts directly and negatively on the independence of the judiciary. It renders the judiciary ineffective and of little help to litigants. It renders meaningless the whole process of taking disputes to court for adjudication. The question that potential litigants will have is, why bother to go to court if court orders are not enforced.

[31] The court strongly believes however that there is no closed line of argument in law. In a properly presented case before it, the court may find it necessary to make inroads into the common law in order to meet the needs of litigants.

[32] Taking into account all the foregoing observations the court will make the following order;

1. **THEPOINT OF LAW IS UPHELD.**
2. **NO ORDER FOR COSTS IS MADE.**

**NKOSINATHI NKONYANE A.J.**

**INDUSTRIAL COURT**